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# Report of the International Law Commission on the work of its fifty-first session (1999)

## Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fourth session prepared by the Secretariat

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## Introduction

1. At its fifty-fourth session, the General Assembly, on the recommendation of the General Committee, decided at its 3rd plenary meeting, on 17 September 1999, to include in the agenda of the session the item entitled "Report of the International Law Commission on the work of its fifty-first session"[1] and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 15th to 28th, 35th and 36th meetings, from 25 to 29 October and 1 to 5 November and on 18 and 19 November 1999. The Chairman of the International Law Commission at its fifty-first session introduced the report of the Commission: chapters I to IV at the 15th meeting, on 25 October; chapter VII at the 18th meeting, on 27 October; chapter V at the 21st meeting, on 29 October; chapter VI at the 24th meeting, on 2 November; and chapters VIII to X at the 25th meeting, on 3 November. At its 36th meeting, on 19 November, the Sixth Committee adopted draft resolution A/C.6/54/L.6 and Corr.1, entitled "Report of the International Law Commission on the work of its fifty-first session". The draft resolution was adopted by the General Assembly at its 76th meeting, on 9 December 1999, as resolution 54/111.

3. By paragraph 20 of resolution 54/111, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the report of the Commission at the fifty-fourth session of the Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate.

4. The document consists of seven sections: A. State responsibility; B. Reservations to treaties; C. Unilateral acts of States; D. International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities); E. Other decisions and conclusions of the Commission; F. Nationality in relation to the succession of States; and G. Jurisdictional immunities of States and their property.

[1] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10 (A/54/10) and corrigenda 1 and 2.*

## Topical summary

# A. State Responsibility

## 1. General comments

### (a) Comments on the draft articles as a whole

5. Delegations underscored the importance of the topic and expressed the hope that the progress made on the draft articles on State responsibility would enable the Commission to adopt them on second reading by the end of its current quinquennium in 2001. As the Commission entered the final phase of its work, it was considered essential to maintain the momentum that had produced a set of draft articles of broad application and appeal. The conclusion of the draft articles on State responsibility, alongside the law of treaties and the law of the peaceful settlement of disputes, was described as constituting the last major building block of the international legal order. The Commission was therefore urged to make every effort to achieve this desirable and feasible goal, with the assistance of States. A suggestion was made that in order to complete the draft articles on State responsibility and ensure their adoption on second reading by 2001, the Commission should retain well-established principles embodied in the draft articles and make only sparing drafting and structural changes; limit progressive development wherever possible; eliminate concepts on which consensus had not been achieved or which were controversial; and ensure a clear relationship between different parts of the draft articles, which had been developed at different times by different Special Rapporteurs. It was also hoped that a precise set of draft articles under Part One and commentary thereto would be available in 2000.

6. The remark was made that the Commission's work on the topic could play a historic role in the codification and progressive development of international law and that the articles would have a lasting impact only if they were widely acceptable to States and mirrored State practice. It was also remarked that the primary objective of the codification of international law on State responsibility was to provide an effective legal framework for the resolution of disputes among States in that area and that the Commission's work must therefore be based on prevailing State practices rather than on abstract concepts. The Commission was encouraged to continue

to distinguish clearly between principles already established under international law and those that were still evolving or developing, to ensure that its work continued to represent the most exhaustive restatement of the law on the topic, to provide a balanced and objective elaboration of the principles articulated therein and to avoid controversy where State responsibility was concerned. It was suggested that a clearly drafted commentary which took into account that distinction, particularly for revised or additional articles, would be a most useful guide for State practice and would be in keeping with the Commission's mandate under its statute.

7. The view was expressed that the Commission's work on the topic should deal with the secondary obligations arising from the breach of an international obligation. The distinction between primary and secondary obligations was considered to enable the Commission to identify the relationships among the different articles and parts of the draft. However, the systematic use of this distinction to restructure the text was also considered debatable in some cases. It was suggested that the Commission should be guided by practical considerations rather than this distinction, which was losing its practical significance with the growing number of international procedural norms currently being formulated. It was also suggested that excessive elaboration of the concept of State responsibility in the draft articles would be counterproductive since the law of State responsibility could not have greater clarity than the primary rules, which did not always lend themselves to universal interpretation and application.

8. Several delegations welcomed the Commission's efforts to simplify and enhance the content, presentation and organizational structure of the draft articles by grouping together related provisions and articles and deleting those that were superfluous. However, it was suggested that the Commission, in its effort to improve the draft articles, should not stray too far from its original version and that any changes should serve to streamline and clarify the text without reducing its content and scope. Noting that significant changes had been made to their content and structure for the sake of clarity or in the interest of the widest possible acceptance, it was further suggested that a balance must be struck to avoid excessive simplification, which weakened the effect of the Commission's work.

9. Several delegations also expressed their appreciation and support for the Special Rapporteur's approach of taking a fresh look at the draft, including its major elements; consulting widely on the subject; streamlining the draft by deleting or merging certain articles for the sake of simplicity and clarity and deleting others appearing to be outside the scope of the draft, particularly in chapters I to III; and updating the draft adopted on first reading in the light of contemporary State practice, decisions and advisory opinions of international tribunals, particularly the International Court of Justice, and the literature. While recognizing the validity of the Special Rapporteur's arguments concerning the need to amend and reformulate the draft articles adopted in 1996, a concern was expressed that such an exercise might further delay the completion of the draft articles. It was also remarked that it was impossible to gain an overall picture of the draft articles or to assess individual provisions since the proposed amendments would render the draft articles substantially different from the text approved on first reading in 1996.

10. The view was expressed that the draft articles required further analysis, taking into account the dynamic of contemporary international relations. The following fundamental issues were identified as requiring attention: the distinction between the criminal and the delictual responsibility of States; the problem of conflicting international obligations; the desirability of categorizing obligations and breaches; a satisfactory regime for the attribution to States of responsibility for internationally wrongful acts; the boundaries and content of the chapter of the draft articles dealing with circumstances precluding wrongfulness and the extent to which articles in that chapter dealt with primary rather than secondary rules; the application of countermeasures by an injured State; and the question of dispute settlement.

11. Attention was drawn to the need to consider the relationship between the various chapters of the draft articles, which was not yet satisfactorily articulated. It was suggested that the Commission should establish the links between the two major elements of the topic, breach of an international obligation and restoration of the rule of law, and then analyse the main or constituent elements of legal relationships, namely the issues raised by the subject of law, issues relating to legal relationships between subjects of law, issues concerning the restoration of observance of obligations

by subjects of law and the means of settling disputes arising from an international responsibility. Noting the relationship between chapters II and III set out in article 3, it was suggested that chapters IV and V might fall under the second part of article 3 concerning the breach of an obligation. The crucial issue of the relationship between wrongfulness and responsibility, which was relevant in establishing the link between chapters III and IV, was identified as requiring more attention. The relationship between the various chapters of part two were also considered to require further thought to avoid inconsistency and imbalance.

**(b) Questions raised by situations involving a plurality of States**

12. Several delegations endorsed the Commission's suggestion that the draft articles should deal with the questions raised by the existence of a plurality of States involved in or injured by a breach of an international obligation, with attention being drawn to the relevance of articles 27 and 40. While recognizing that such problems should be dealt with, if possible, as an integral part of the regime of State responsibility, the scarcity of established international law on the subject was noted. It was also suggested that such situations did not appear to necessitate a particular treatment in the draft articles, but could be covered in the commentaries.

**(c) *Jus cogens* and *erga omnes* obligations**

13. There was support for referring to the hierarchy of norms in international law and identifying levels of seriousness of wrongful acts, with greater responsibility for a violation of a *jus cogens* norm or an *erga omnes* obligation. It was remarked that the magnitude of the responsibility, which affected such issues as reparation or compensation, depended on the kind of rule transgressed and that the breaching of a peremptory norm, such as the prohibition of the use of force in international relations, had a far more serious effect, nature and scope than the breach of a contractual rule between two States. It was observed that the Commission's proposal to include a general provision on peremptory norms in chapter I, reproducing the definition in article 53 of the Vienna Convention on the Law of Treaties, would establish a general link between the principle of *jus cogens* and the subject of State responsibility, especially since a number of provisions of the draft articles referred to that principle directly or indirectly. It was suggested that since the international community had adopted the notion of *jus cogens* in the Convention, it must take the next logical step of giving exact content to the concept, with attention being drawn to documents A/CN.4/54, paras. 16, 26 and 105 to 119, and A/C.6/47/SR.21. It was felt that the effect of *jus cogens* and that of Article 103 of the Charter of the United Nations should be clarified: whereas Article 103 dictated that in case of conflict between the Charter and a treaty, the Charter prevailed, *jus cogens*, if established, nullified the treaty. However, concern was expressed that the introduction of the notions of *jus cogens* and *erga omnes* obligations in the law of State responsibility would require extensive qualification, the definition of peremptory norm in the Convention was insufficient for the needs of the law of State responsibility, and the notion of *erga omnes* obligations involved procedural issues which would have to be considered in the context of the definition of injured State.

**(d) Final form of the draft articles**

14. The eventual form of the draft articles was identified as a difficult unresolved issue. Some delegations felt that the Commission's work should lead to the adoption of a convention possibly during an international conference, particularly in view of the tremendous effort invested by the Commission in the topic and the need for a clear convention that could be implemented in practice. In contrast, such an outcome was described as unlikely and a preference was expressed for guidelines or a solemn declaration by the General Assembly. In calling for flexibility in establishing their final form, the draft articles were described as secondary rules which could not affect the primary rules or obligations contained in international conventions or arising from customary international law. Recalling the relevant provisions of the Commission's statute, it was noted that the eventual form of the Commission's drafts was not limited to multilateral conventions and that where State practice was extensive but also divisive such a solution was not necessarily the most appropriate means of ensuring the progressive development of the law. It was suggested that this question should be left open for the time being.

#### (e) Relationship to other rules

15. Attention was drawn to the close relationship between the codification of State responsibility and the purposes and principles of the Charter of the United Nations. The Commission was also congratulated on its thorough discussion of the interrelations of the law of State responsibility both with the law of treaties and with the criminal responsibility of individuals. It was further noted that the draft articles would not apply to self-contained legal regimes, such as those on the environment, human rights and international trade, which had been developed in recent years.

## 2. Comments on specific draft articles

### Part One
### Origin of international responsibility

16. The Special Rapporteur was commended for simplifying and clarifying part one and the provisional changes were welcomed. However, it was also remarked that the proposed revisions required further careful study, given the complexity of the issues.

#### Article 1
#### Responsibility of a State for its internationally wrongful acts

17. A concern was expressed that this article could be interpreted to mean that any State could bring action against the defaulting State, whether or not it was affected by the internationally wrongful act, rather than permitting only the affected State to bring action, and only then if it could prove damage.

### Chapter III
### Breach of an international obligation

18. Chapter III was described as the linchpin of all the provisions of the State responsibility regime. A number of delegations supported the simplification, streamlining and rationalization of this somewhat overregulated chapter, provided that clarity and comprehensiveness were retained and the anticipated legal content and regulatory effect of the document were not weakened.

#### Article 16
#### Existence of a breach of an international obligation

19. There were differing views concerning the reformulation of this article, which was described as crucial and its inclusion essential. Several delegations supported the reformulation of articles 16, 17 (1), and 19 (1) into a single article 16 as a great improvement that covered the content of those provisions and permitted the deletion of the latter ones without any loss of substance. In contrast, the Special Rapporteur's proposed reformulation of article 16 was described as not entirely satisfactory because it encompassed at least two different questions previously dealt with in articles 16, 17 (2) and 19 (1); combined several important provisions which deserved to be dealt with separately; and involved renumbering, which was best avoided.

20. There were also differing views as to whether article 16 raised unresolved issues concerning conflicting international obligations or a hierarchy of rules of international law requiring further consideration. The view was expressed that it did not raise such issues because in the event of a conflict between an obligation under international law or *jus cogens* norms, *erga omnes* obligations or obligations under Article 103 of the Charter of the United Nations, the question of international responsibility would not arise, even if the right to compensation could be invoked. It was suggested that in resolving the problem of a treaty obligation conflicting with general international law, article 62 of the Vienna Convention on the Law of Treaties (fundamental change of circumstances) could be invoked to lessen the impact of *jus cogens* in articles 53 (treaties conflicting with a peremptory norm of general international law) and 64 (emergence of a new peremptory norm of general international law) of the Convention and that, in any event, the effect of *jus cogens* would override the validity of a treaty as a whole in case of inconsistencies. The merit of including a hierarchical provision was nonetheless recognized. Believing that it was not sufficient to indicate the hierarchically higher status of peremptory obligations as compared to treaty obligations, it was also suggested that the Commission should indicate what those peremptory norms were, if only in the commentary. At the same time, the remark was made that since the source of the obligation — whether customary, conventional or other — was

irrelevant to the effects of the responsibility, it would be wrong to set up a system linking the existence of responsibility with the source of the rule that had been breached, even if that source had an effect on the specific consequences of the responsibility.

**Article 17**
**Irrelevance of the origin of the international obligation breached**

21. A preference was expressed for retaining and clarifying article 17, paragraph 2. Contrary to the Special Rapporteur's interpretation of that provision set out in paragraph 92 of the Commission's report, it was felt that the paragraph had been intended to enunciate one of the fundamental principles of State responsibility, namely, the irrelevance of the source of an international obligation to the responsibility that arose. It was therefore proposed, based partly on the views expressed in paragraph 103 of the report, that the paragraph should be reworded to read: "The international legal responsibility of a State which has committed an internationally wrongful act arises regardless of the origin of the international obligation breached by that State."

**Article 18 (1) and (2)**
**Requirement that the international obligation be in force for the State**

22. The view was expressed that the principle of intertemporality, providing that the obligation that had been breached should be in force in the transgressor State, was one of the basic requirements for the existence of international responsibility which should be clearly reflected in article 18 (1) without exception since it applied equally to all international obligations. There was support for the modification of this article with its general rule on the time factor in relation to breaches of international law whereby an act of a State should not be considered a breach of an international obligation unless the State was bound by the obligation in question at the time that the act occurred. There was also support for the Special Rapporteur's proposal in paragraph 121 of the report to include a draft article enunciating the principle that, once the responsibility of a State was engaged, it did not lapse merely because the underlying obligation had terminated.

**Article 19**
**International crimes and international delicts**

23. While some delegations expressed serious concerns or reservations about including the notion of State crimes in the draft, others felt that it should deal with exceptionally serious wrongful acts, or international crimes, as well as ordinary wrongful acts, or international delicts. It was suggested that in its future work the Commission should take into account the substantive distinction between international delicts and international crimes, especially in relation to the regime of the consequences of responsibility, as well as contemporary developments in international law, particularly the adoption and forthcoming entry into force of the Rome Statute of the International Criminal Court. The distinction between delicts and crimes or exceptionally serious wrongful acts was considered important if specific rules were to be established to govern the legal consequences of those acts. Emphasis was placed on the need to provide in the draft articles for a strengthened special regime of responsibility with regard to the most serious violations of international law, i.e., violations of *jus cogens* rules or *erga omnes* obligations, regardless of whether the language used in article 19 was retained. A preference was expressed for replacing the notion of international crime of a State by the notion of a "particularly serious breach of an international obligation". While opposing the inclusion of the concept of State crimes, it was suggested that the Commission should consider whether there should be a hierarchy of international obligations and whether any special legal consequences should be prescribed for the breach of such obligations since no useful purpose was served in categorizing international obligations unless different legal consequences were provided for breaching them.

**Article 20**
**Breach of an international obligation requiring the adoption of a particular course of conduct**

**Article 21**
**Breach of an international obligation requiring the achievement of a specified result**

**Article 23**
**Breach of an international obligation to prevent a given event**

24. Some delegations felt that the reformulation of articles 20, 21 and 23 was justified because the

distinction that they made between obligations of conduct, result and prevention had no bearing on the consequences of a breach as developed in part two of the draft and did not fall within the realm of responsibility. Other delegations believed that the simplification of the draft articles had gone too far in eliminating the distinction between the three types of obligations, which was valuable in analytical terms and should be retained in some form. Still other delegations emphasized the importance of retaining the distinction between obligations of conduct and result since it had major implications for the secondary rules that would be developed to determine State responsibility; helped to determine when a breach occurred and when it was completed; was useful in practice and in the jurisprudence; had become a commonly accepted aspect of legal terminology; and might prove useful in other chapters. Attention was drawn to State practice and the decisions of international courts as revealing the nearly constant application of this distinction, particularly in relation to the protection of fundamental human rights.

25. There were various suggestions concerning these provisions. It was suggested that the obligation of prevention could be dealt with in the framework of the obligation of result and the distinction between obligations of conduct and result could be simply mentioned in article 16, with a detailed explanation in the commentary. It was also suggested that a general reference to the distinction between obligations of conduct and result could be included in article 16 or the original provision could be simplified in order to make the draft more straightforward yet complete. Merely mentioning this distinction in the commentary, which had only an interpretative and not a normative function, was considered unacceptable. It was further suggested that if the Commission was unable to arrive at a suitable formulation for the distinction between obligations of conduct and result, it should take into account the general principles of law and the jurisprudence of international tribunals rather than adopt a solution that was only significant for some internal legal regimes. Further clarification and simplification of the distinction between the three obligations would be appreciated.

**Article 22**
**Exhaustion of local remedies**

26. Some delegations favoured retaining the exhaustion of local remedies rule in article 22 as firmly established in treaty and customary law. It was considered an essential component of the law of State responsibility in specifying that a State was only in breach of an international obligation when the other party could not succeed in obtaining from that State a behaviour corresponding to the international obligation in question, after exhausting all local remedies or as a result of a denial of justice. The view was expressed that the rule was as a matter of substance, and not of the implementation of State responsibility, which was of crucial importance and should be reconsidered; it should be clarified that the rule concerned not the time when a diplomatic complaint or international judicial claim was presented, but the time when the internationally wrongful act was actually committed and thus triggered the international responsibility of the foreign State on which the complaint or claim was based; and the issue was not one of coordinating the norms on the objective element of State responsibility with the exhaustion of local remedies rule but of identifying the moment when the internationally wrongful act occurred and evaluating the international responsibility of the State at the international level. The view was also expressed that the rule was undoubtedly applied in international practice as a general principle during the preliminary stage concerning recognition of the international responsibility of a State, with the decisions of human rights bodies concerning the incompatibility of domestic laws with treaty rules constituting an exception to the rule not justifying its derogation. It was considered necessary to reaffirm this rule in the present draft articles even if its scope depended on its concrete application for each category of primary rules, regardless of the future codification of the rules on diplomatic protection.

27. Other delegations welcomed the Special Rapporteur's proposal to replace article 22 by article 26 *bis*. It was observed that this provision raised the interesting question of the beginning of the obligation in relation to the exhaustion of local remedies and that, in certain situations, responsibility might not be invoked before the exhaustion of those local remedies, which the Commission must clearly indicate. It was considered wise to strengthen this procedural provision

which was actually substantive, defining the moment at which State responsibility could be invoked. Non-compliance with the provision was said to affect the very existence of responsibility, since the exhaustion of local remedies could determine whether or not international responsibility existed by giving the State an opportunity to correct its wrongful conduct. Support was also expressed for formulating the provision as a savings clause, since that rule operated as a prerequisite to an international claim in certain cases.

28. A further view was expressed that the inclusion of the exhaustion of local remedies rule was not necessary, since on the one hand the existence of an international delict within the meaning of draft article 16 was independent of the existence of local remedies, and on the other hand the lack of local remedies might in itself constitute an internationally wrongful act giving rise to a separate responsibility.

29. It was considered fortunate that the Commission had decided to postpone the decision on the question of the exhaustion of local remedies, which should be carefully studied in order to determine its placement, its function and its relation to the questions of diplomatic protection.

**Articles 18 (3) to (5)**
**Requirement that the international obligation be in force for the State**

**Article 24**
**Moment and duration of the breach of an international obligation by an act of the State not extending in time**

**Article 25**
**Moment and duration of the breach of an international obligation by an act of the State extending in time**

**Article 26**
**Moment and duration of the breach of an international obligation to prevent a given event**

30. Some delegations expressed support for the reformulation of articles 24 and 25 incorporating provisions of article 18 and 26, noting that these provisions had been considered too vague by some States and too analytical by others. While supporting the simplification of articles 24 and 25 on completed and continuing wrongful acts, it was considered important to preserve this distinction since a completed wrongful act was qualitatively different from a continuing one and might involve different consequences. It was felt that the special rules for continuing and composite acts in article 18 should be incorporated in draft articles 24 and 25. With regard to the distinction between composite acts and complex acts, it was also felt that there seemed to be no reason to maintain the concept of complex acts in the draft articles since the legal regime applying to composite acts would govern complex acts as well.

31. As regards completed and continuing acts, it was suggested that paragraphs 1 and 2 of articles 24 and 25 should be dealt with in succession with regard to responsibility and the object of the obligation; paragraph 3 of article 24 should be included among the provisions having to do with the object of the responsibility. While endorsing the distinction between completed and continuing acts, it was observed that in articles 24 and 25 the phrase "remains not in conformity with the international obligation" appeared to refer to what happened when the legal ground for the responsibility, the primary obligation, underwent a change while the conduct in question was continuing. It was suggested that for the sake of clarity it would be useful to draw a sharper distinction between two problems, i.e., the question of the temporal link of a violation to specific conduct of a State and the intertemporal question, which affected the legal foundation of the violation itself. In characterizing the distinction between completed and continuing acts as a highly political issue, it was remarked that there were no legal grounds for arguing that the deprivation of property after the Second World War by nationalization or expropriation, for which no compensation had been paid, should be considered acts of continuing character and treated as such under the European Convention on Human Rights. First, it gave a retroactive effect to the Convention, contrary to its provisions and to the law of treaties, and second, in the 1990s, the States concerned had adopted laws concerning the restitution of confiscated property or compensation, which had become effective (*ex nunc*) from the date of the restitution or compensation, and not from the date when the deprivation of property had taken effect.

32. While noting that the definition of "continuing wrongful acts" and "composite acts" in the draft articles might appear to be too abstract and unhelpful, it was suggested that those provisions should be retained and their inevitably abstract nature offset by a

commentary, because that type of theoretical approach was of undeniable value in practice and might play a key role in determining the responsibility of a State or the reparation for which it was liable. In addition, doubts were expressed regarding the proposed narrower understanding of the concept of composite acts, in that it would exclude simple obligations breached by composite acts, such as the obligation of a riparian State not to take more than a certain amount of water per year from a boundary river, which that State breached by taking slightly more than the permitted quota each month. While under the narrower understanding the breach in such a case occurred only when the State had exceeded the annual quota, not when the action began, it was felt that the totality of takings should be considered unlawful, for it was not the last takings in themselves that constituted the transgression but the total number. Attention was drawn to the decision by the International Court of Justice in the *Case concerning the Gabcikovo-Nagymaros Project* as significantly impacting the discussion of composite acts.

33. A concern was expressed that although the reasoning behind that the Commission's intention to remove any reference to complex acts was understandable, that approach might make it more difficult to understand article 25 as proposed by the Special Rapporteur. Clarification and simplification of the concept of "complex acts" would be appreciated.

## Chapter IV
## Implication of a State in the internationally wrongful act of another State

34. Chapter IV was described as fundamentally important and indispensable to the balance of the draft articles and its retention was welcomed. It was remarked that the State responsibility which was indirectly involved in a breach of an international obligation (aid, assistance, direction, control or coercion) should be treated in the same way as State responsibility which was a direct breach of that obligation.

35. The view was expressed that the nature of a State's responsibility for the acts of another State should be considered broadly taking into account the concepts of *jus cogens* and *erga omnes*. Responsibility existed only when the conduct of a State involved the breach of an international rule that required it to act in a specific way. It had long been accepted that a State could bear responsibility for the wrongful act of another State when assisting, directing or controlling the commission of an internationally wrongful act or coercing it. Such responsibility would, however, depend on the obligations under international law of the State that encouraged the other State.

36. Attention was drawn to the more complicated situation when several States acted jointly in the perpetration of the wrongful act. The view was expressed that the Commission should examine the responsibility of the States members of an international organization in respect of the organization's acts, especially as recent events had shown that a departure from the rule of the non-responsibility of the States members of an international organization taken as a separate subject of international law could not be completely excluded. The view was also expressed that the important question was the responsibility of States acting collectively, whether or not through an international organization or separate legal person; States should not be able to evade responsibility for their wrongful acts even if they acted in the framework of international organizations; in that context, the requirement that an internationally wrongful act must be internationally wrongful not only for the committing State, but also for the "assisting" State, appeared superfluous; and this situation was such a topical one that the Commission could not defer a decision until it had dealt with the articles on the responsibility of international organizations, as indicated in paragraph 260 of the report. While believing that the problem of the responsibility of a State which acted jointly with an international organization could not be solved in the draft articles under consideration, it was suggested that a provision could be added, for example in chapter II, to the effect that wrongful conduct could be attributable to several States in a situation in which they participated or engaged jointly in wrongful conduct. Such a reference might prevent the article's silence on that question from being interpreted in the opposite sense.

37. The use of juridical terminology taken from domestic criminal law was noted. The specific characteristics of international complicity were considered to preclude the wholesale application to it of the relevant provisions established under national

legal systems. From a practical standpoint, the question of which national legal system had exerted greater influence on the formulation of the provisions in this chapter, referred to in paragraph 244 of the report, was felt to be of purely theoretical significance.

38. The proposed title (Responsibility of a State for the acts of another State) was considered more appropriate than the original title, with a suggestion being made that it should also contain the notion of wrongfulness.

**Article 27**
**Aid or assistance by a State to another State for the commission of an internationally wrongful act**

**Article 27 *bis***
**Direction and control exercised over the commission of an internationally wrongful act**

**Article 28**
**Responsibility of a State for an internationally wrongful act of another State**

39. There was support for addressing the questions that arose when several States were involved in producing an internationally wrongful act and for reformulating the provisions for greater clarity. The use of the word "assistance" in article 27 was considered appropriate since the issue was not the joint conduct of two or more States, which might appropriately be placed under chapter II, but rather the specific problem of the possible implication of one State in the wrongful act of another State, which deserved separate treatment. The incorporation of exact criteria for the circumstances under which a State aiding in the commission of an internationally wrongful act was internationally responsible was welcomed. The proposed new element that an assisting State's responsibility should be confined to completed acts that would have been wrongful had they been committed by the assisting State itself was considered very satisfactory since the concept of a State's responsibility for the aid and assistance it provided to another State in the commission of an internationally wrongful act could not be accepted without taking into account the subjective element, namely, the wrongfulness of the act, which would be sufficient in that case. The proposed reformulation of articles 27 and 28 was considered to clarify the international responsibility of a State which aided or assisted another State or exercised direction or control over it in the performance of an internationally wrongful act by providing that international responsibility was triggered as soon as the State in question acted with knowledge of the circumstances of the internationally wrongful act, although problems might still arise in a case of coercion that was not itself unlawful under international law. The proposal to incorporate an intent requirement in article 27 was also supported since assistance to another State should constitute a wrongful act where the assisting State intended to assist in its commission.

40. In contrast, the proposed combination of articles 27 and 28 (1) was questioned, with the two cases being described as quite different and not necessarily subject to the same legal regime. The responsibility of a State implicated in the wrongful act of another State was considered to be engaged differently depending upon the case: in the case of aid or assistance, its responsibility was engaged if the wrongfulness of the act resulted from a violation of an obligation of both States; in the case of exercise of direction or control, it was engaged if the source of the wrongfulness lay in the violation of an obligation of the State exercising the direction or control; in the case of coercion, it was engaged if the wrongfulness was based on the violation either of an obligation of the coercing State or of an obligation of the coerced State. Concern was also expressed that the proposed wording might prompt a State wishing to escape an international obligation to compel another State not bound by the same obligation to commit the violation in its stead.

41. Support was expressed for the approach of avoiding any discussion of the legitimacy of the coercion exercised by a State on another State since the decisive point appeared to be that a State forced the hand of another State in order to commit by that means an internationally wrongful act. It was suggested that proposed article 28 should be clarified so that the term "coercion" was not limited to the use of armed force, but extended to any contact, including economic pressure, that left the coerced State with no option but to comply with the desires of the coercing State.

42. Appreciation was expressed for the distinction drawn between aid and assistance, direction and control, and coercion which should be reflected in part two, dealing with accompanying responsibility. The reformulation of articles 27 and 28 in three distinct articles was considered to clarify ambiguities

concerning the concepts of "direction and control" and "coercion", which were not identical in meaning and shared some aspects of "aids or assists".

**Article 28 *bis***
**Effect of this chapter**

43. It was emphasized that the proposed savings clause should cover all the cases envisaged in chapter IV so that its provisions would not preclude any other basis for the responsibility of a State that assisted, directed and controlled or coerced another State. In contrast, this provision was described as superfluous if it was clearly stated that the responsibility of the party in direct breach of an international obligation was never in doubt.

## Chapter V
## Circumstances precluding wrongfulness

44. While expressing satisfaction with the Special Rapporteur's simplifications, it was observed that the chapter might be too detailed and that the Commission's discussions tended to increase the number of exceptions which would have negative consequences for *pacta sunt servanda*. It was felt the circumstances precluding wrongfulness should be strictly limited to an exhaustive list so that States could not evade their responsibilities. It was observed that the circumstances did not preclude the State's obligation, which continued since the circumstance which affected it was limited in time.

45. Suggestions were made to amend the title to "Circumstances eliminating responsibility" and reword chapter V since the circumstances precluded responsibility rather than wrongfulness.

**Article 29**
**Consent**

46. While supporting article 29, concerns were expressed regarding its possible misinterpretation and the ambiguous role of consent as a circumstance precluding wrongfulness, particularly where the breach of an international obligation concerned more States than the one which was directly injured and which might have consented. It was considered essential to define the criteria for its application in the article and commentary.

47. There was opposition to deleting this article despite the argument that consent was an element of the primary rule since the existence of consent precluded the wrongful act and not its wrongfulness. It was noted that in practice the debate often focused on the existence of consent by State organs, rather than of the wrongful act. It was also observed that its deletion would not simplify the draft or avoid the need to define the conditions under which consent precluded wrongfulness and also that the regulation of consent in the draft articles, together with a commentary, would help to strengthen legal certainty in international relations.

48. The view was expressed that consent given in advance constituted a circumstance precluding wrongfulness if it was in force at the time of the act. However, consent *a posteriori* constituted a waiver by the injured State of its right to claim reparation, without eliminating the wrongfulness of the act, which was already established.

49. The inclusion of a *jus cogens* exception to the general rule of consent in paragraph 2 was considered warranted. Conversely, its deletion was favoured because consent could apply to some peremptory norms, such as the prohibition of military intervention in the territory of another State, and certain peremptory norms of international law could be construed as containing an "intrinsic" consent element. Caution was advised since peremptory norms were non-derogable by agreement between the parties as that would be contrary to international public policy.

**Article 29 *bis***
**Compliance with a peremptory norm**

50. Support was expressed for article 29 *bis* which recognized the precedence of *jus cogens* over other norms of international law, even if it were rarely applied. Suggestions included retaining the definition of "peremptory norm"; specifying some of the peremptory norms of international law; and referring not only to the straightforward application of *jus cogens*, but also to the situations arising from State practice based on Article 103 of the Charter of the United Nations, and involving not only the use of force but also compliance with economic sanctions imposed by the Security Council. Conversely, others felt that this provision was of limited practical application.

**Article 30**
**Countermeasures in respect of an internationally wrongful act**

51. Countermeasures were described as constituting an important circumstance precluding wrongfulness recognized in international jurisprudence. The proposed reformulation linking this article with others on countermeasures was considered an improvement. It was suggested that countermeasures should be dealt with within the framework of the provisions relating to the re-establishment of compliance with obligations, as an instrument for guaranteeing the execution of the obligation, reparation or cessation, which was linked to the implementation of international responsibility. Conversely, doubts were expressed regarding the need to treat countermeasures as a circumstance precluding wrongfulness. It was suggested that the article, if retained, should specify what constituted a permissible countermeasure, and that articles 30 and 30 *bis* should be retained in square brackets until the regime of countermeasures was defined in chapter III of part two.

**Article 30 *bis***
**Non-compliance caused by prior non-compliance by another State**

52. This proposal gave rise to a number of suggestions, including: elaborating it further, especially concerning its relations with countermeasures and *force majeure*; incorporating it in one of those provisions despite its distinct legal character from either; strengthening the causal link between prior non-compliance and subsequent non-compliance; and referring to proportionality. However, the usefulness of including such a provision was also questioned since it risked legitimizing non-compliance with a particular obligation without reference to the general conditions limiting the application of countermeasures. It was also pointed out that the *exceptio inadimpleti contractus* appeared to be a primary rule.

**Article 31**
***Force majeure* and fortuitous event**

53. Support was expressed for the proposed reformulation of the article by deleting the words "fortuitous event". It was considered essential that the commentary clearly indicate that: *force majeure* must be genuinely beyond the control of the State invoking it; *force majeure* would not apply to situations in which a State brought it upon itself, either directly or by negligence, or by assuming the risk of such an occurrence; and material or actual inability to comply was distinguished from circumstances making such compliance more difficult. There also was support for the restrictive exception to the possibility of invoking *force majeure* resulting from the conduct of the State invoking it, even if such conduct was not wrongful. While the proposed deletion of the requirement of knowledge of wrongfulness was also supported, since international law did not require a State to know that its conduct was not in conformity with an obligation, the suggestion was made that the reference to an "unforeseen external event" should be replaced by the less subjective term "unforeseeable" to avoid any misinterpretation.

**Article 32**
**Distress**

54. Concern was expressed that the article could be abused since it stressed the subjective element, i.e., "reasonably believed", rather than an objective criterion such as emergency measures taken by a person to protect the lives of other persons entrusted to him. In terms of a further view, extending the scope of distress beyond where human life was at stake to cases involving honour or moral integrity was not without risk, since increasing the provision's scope of application could allow for abuse.

**Article 33**
**State of necessity**

55. The view was expressed that this difficult and problematic provision should be retained and reformulated in the negative so that necessity could be invoked only in extreme cases. It was noted that, as in the *Gab□ikovo-Nagymaros Project* case, although necessity could justify non-compliance with a treaty, the treaty continued to exist and the duty to comply with it was revived when the state of necessity ceased. It was also observed that humanitarian intervention was governed by primary rules, notably Article 2, para. 4, of the Charter of the United Nations, and that necessity could not be invoked to justify the violation of these peremptory norms, which should be explained in the commentary to prevent any misuse. It was suggested that the problem of scientific uncertainty and the precautionary principle should be addressed in the article or commentary. In contrast, it was suggested that the *Fisheries Jurisdiction (Spain v. Canada)* case

should not be mentioned in the commentary since the arrest by force of a Spanish vessel on the high seas could not be justified by the state of necessity.

56. It was suggested that the Drafting Committee's changes in the Special Rapporteur's proposed text should be examined carefully given their far-reaching effects and potential for abuse, namely: the article's scope of application was broadened since the criterion of "essential interest" in paragraph 1 (a) was no longer limited by the reference to the State and "the international community as a whole" was referred to in paragraph 1 (b) to take into account obligations *erga omnes*.

### Article 34
### Self-defence

57. The importance of this article conforming with the Charter of the United Nations was emphasized. It was suggested that the phrase "or other relevant rules of customary international law as appropriate" be inserted after "Charter of the United Nations" to expand the scope of this article beyond the condition set by Article 51 of the Charter based on differences in the two notions of self-defence and the evolution and nature of relations between current subjects of international law. Support was expressed for addressing the problem dealt with by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, with an explicit paragraph such as proposed article 29 *ter*, para. 2, being considered preferable to a mere elaboration in the commentary. Conversely, doubts were expressed concerning the usefulness of adding a new paragraph to clarify that the lawful exercise of the right to self-defence did not imply a dispensation from compliance with the rules and principles of *jus in bello*, since such compliance was implicit in the notion of "a lawful measure of self-defence".

### Article 34 *bis*
### Procedure for invoking a circumstance precluding wrongfulness

58. There were differing views concerning the usefulness of this proposal. In opposition to it, attention was drawn to the flexible and informal nature of inter-State relations and the automatic operation of most circumstances precluding wrongfulness which rendered advance notice impossible. It was suggested that the provision should be included in the section dealing with dispute settlement, which could create a bridge between the state of wrongfulness and the re-establishment of lawfulness.

### Article 35
### Reservation as to compensation for damage

59. Support was expressed for retaining this article, as adopted on first reading, since the circumstances precluding wrongfulness were temporary and did not affect the validity of the international obligation concerned. The compensation for damage resulting from invoking a circumstance precluding wrongfulness was considered unclear and requiring further review especially since, if the previous behaviour of the State affected by the act was wrongful, there was no justification for indemnifying it, while the innocent State must be indemnified by the State which had breached its rights and harmed its interests. It was suggested that the question of indemnifying the affected State could also be dealt with in that context. It was also suggested that this article be included in the part dealing with the re-establishment of a lawful state.

60. Conversely, the Special Rapporteur's proposed reformulation of article 35 was also supported, provided that its invocation was without prejudice to the cessation of any act not in conformity with the obligation and the subsequent compliance with it when and to the extent that the circumstance precluding wrongfulness no longer existed. There was also support for dealing with cessation in this article.

### Other possible circumstances

61. The "*clean hands*" doctrine was not considered to constitute a circumstance precluding wrongfulness or to merit treatment as such. *Due diligence* was considered logically connected to the distinction between breaches of the obligation of result, conduct and prevention rather than constituting such a circumstance. At the same time, it was considered important to mention due diligence as a standard to be applied to the performance of the obligations of international law or at least to include a "without prejudice" clause, as in article 73 of the Vienna Convention on the Law of Treaties, accompanied by appropriate commentary. It was considered unnecessary to include *duress* as a circumstance since all the hypotheses provided for by the Vienna Convention on the Law of Treaties were already covered by article 31 on *force majeure*.

## Part two
## Content, forms and degrees of international responsibility

## Chapter I
## General principles

### Article 40
### Meaning of injured State

62. It was suggested that the provision should clearly define the delictual infringement of a right of an injured State, and that an explicit reference should be made to material or moral damage suffered by the State in question. The definition could thus include two elements: the element of moral or material injury and the element of causality between the injury and the act. Others maintained that it was not necessary to refer to the damage so caused, since the infringement of a right might give rise to potential damage and not cause actual damage. It was also recommended that international responsibility should be restricted to the protection of the State's own rights and interests. Therefore, the State could be considered "injured" if it had suffered damage resulting from the infringement of a right that had been created or was established in its favour, or had been stipulated for the protection of a collective interest arising out of a treaty by which it was bound; or if the enjoyment of its rights or the performance of its obligations had been affected by the internationally wrongful act of another State; or if the obligation infringed had been established for the protection of human rights and fundamental freedoms.

63. Conversely, concern was expressed that paragraph 2 (e) (iii) allowed any State party to a multilateral treaty for the protection of human rights and fundamental freedoms to be considered an injured State and therefore to seek reparation. While acknowledging the special position of human rights treaties, it was queried what form the reparation to other States parties might take when a State party to a human rights treaty had violated the rights of its own citizens in breach of its international obligations, and how the reparation might be assessed in the absence of actual injury to the other States parties. If reparation in such cases was not limited to assurances and guarantees of non-repetition, the provision could lead to States seeking the other forms of reparation listed in article 42. It was suggested that the reference in paragraph 2 (f) to treaties for the protection of the collective interests of States parties also required clarification as to the kind of multilateral treaties covered and the question of reparations.

64. Support was expressed for the proposal that a State or States specifically injured by an internationally wrongful act should be distinguished from other States having a legal interest in the performance of the relevant obligations, but which did not suffer economically quantifiable injury. It was noted that the legal interest in question should be identifiable and specific and not merely be the interest that each State might have in ensuring respect for international law by other States; and even if it might exist for both categories of States, in the practice of States only the specifically injured State should have the right to seek reparations, and to be compensated (including, in addition to the principal amount of pecuniary damage, interest and loss of profit). As such, paragraphs 2 (e) and (f) and paragraph 3 were considered confusing since they contemplated an "injured" State claiming reparation in the form of restitution, compensation and satisfaction despite there being no basis in international law or practice for States to seek reparation in the absence of actual harm. It was also noted that responsibility for the breach of rules whose structure no longer corresponded to the classic Westphalian system, such as *erga omnes* obligations, could not be treated in the same manner as rules based on reciprocity. *Erga omnes* obligations did not imply that all States were affected by a violation in the same manner: injured States could be distinguished from those entitled to take legal action against the wrongdoer, and the remedy available to non-injured interested States would be limited to the right to call for the cessation of the unlawful conduct and for reparation to be made to the injured State. Conversely, doubt was expressed as to whether the distinction would serve a useful purpose given the uncertainty of the concept of "other States which have a legal interest".

65. The view was expressed that the State directly affected by a violation of a peremptory norm, or an "international crime", could be distinguished from other States. However, support was also expressed for the approach in paragraph 3, whereby not only those whose rights had been infringed by an international crime but all States would be considered "injured States". Yet it was also felt that the paragraph could be further elaborated so that the concomitance of all the

consequences of the wrongful act listed in chapter II when an "international crime" was committed would not be required.

66. It was observed that the list of situations in paragraph 2 was not exhaustive and could cause confusion since it did not expressly mention either bilateral custom or breach of obligations arising from a unilateral act, which could be *uti singuli* or *erga omnes*, despite the reference to customary law in subparagraph (e). Conversely, support was expressed for an illustrative list to allow for the possibility of other situations. It was also noted that the question of a State being injured by a unilateral act of another State was currently being considered by the Commission under a separate topic. At the same time, doubt was raised as to whether the list was useful since some of the examples were problematic. For example, paragraph 2 (e), addressing injury by a violation of a multilateral treaty, appeared to usurp article 60 of the Vienna Convention on the Law of Treaties. It was maintained that violations of treaty provisions should first be governed by the provisions of the treaty itself, after which the appropriate legal framework would be the law of treaties, not State responsibility.

## Chapter II
## Rights of the injured State and obligations of the State which has committed an internationally wrongful act

67. The chapter was considered well balanced. However, attention was drawn to the need to consider the relation between States entitled to invoke responsibility with regard to the same breach and the question of whether one State's claim for reparation absorbed the rights of the other States.

### Article 41
### Cessation of wrongful conduct

68. Support was expressed for the underlying principle since the obligation to cease wrongful conduct was the first necessity. It was felt that cessation could appear in a separate provision or in an article on the consequences of an internationally wrongful act (art. 36).

### Article 42
### Reparation

69. The requirement of full reparation without qualification was considered well established in international law. It was noted that only the State directly affected could claim reparation for the damage suffered and that other States must be satisfied with the obligations set forth in draft articles 41 and 46, without prejudice to Chapter VII of the Charter of the United Nations. Doubts were expressed regarding the legal basis for the exception in paragraph 3, which could be abused by States to avoid their legal obligations and erode the principle of full reparation.

### Article 43
### Restitution in kind

70. There was opposition to the exception provided in subparagraph (d).

### Article 44
### Compensation

71. Compensation was considered an essential issue which required more detailed provisions, particularly concerning the assessment of pecuniary damage, including interest and loss of profits. Suggestions included referring to the various forms of compensation proposed by the Special Rapporteur in 1989 or the various rules derived from international practice and jurisprudence, such as the principle whereby damage suffered by a national was the measure of damage suffered by the State. It was also suggested to provide that interest "shall", rather than "may", be included in any compensation award to reflect existing international law and to deprive the wrongdoing State of an incentive to delay payment of compensation. It was remarked that payment of interest on overdue compensation should be determined only after the amount of compensation had been fixed and a sufficient grace period for its payment had been allowed. Conversely, it was considered unnecessary to specify the obligation to pay interest. A preference was expressed for a more analytical version of article 44, which made no reference to interest or lost profits.

### Article 45
### Satisfaction

72. It was suggested that the term "moral damage" in paragraph 1 should be defined. Reservations were

expressed regarding paragraph 2 (c) since international law did not permit the imposition of monetary damages and interest for satisfaction in the case of moral prejudice under the *Carthage* and *Manouba* cases. Attention was drawn to the possible inclusion of the new forms of "constructive reparation" recognized in the *Rainbow Warrior* case. It was noted that paragraph 2 (c) referred to punitive damages, which were not recognized in all jurisdictions. It was suggested that paragraph 2 (d) covered a domestic concern regarding disciplinary action against officials which should not be covered in the draft articles. It was also suggested that paragraph 3 should be deleted to avoid a State committing a wrongful act being able to invoke the dignity of State as justification.

### Article 46
### Assurances and guarantees of non-repetition

73. The inclusion of this article in the chapter dealing with reparation for injury was considered surprising since, unlike restitution in kind, indemnification or satisfaction, which tended to cancel or attenuate the injury, assurances and guarantees of non-repetition referred to possible future injury and were more closely related to precautionary measures.

## Chapter III
## Countermeasures

74. It was stated that countermeasures played an important role in the regime of State responsibility and that chapter III constituted a valuable summary of State practice, striking a fair and appropriate balance between the interests of the injured State and the wrongdoing State. Nevertheless, it was noted that countermeasures could be tolerated under international law only as a last-resort solution in exceptional cases, and therefore they should be clearly and precisely regulated, as far as possible, to reflect the existing rules of customary international law, while not attempting to recast or improve on those rules. Suggestions included: narrowly defining the limits of countermeasures and the exceptional nature of their application so as to prevent abuse; establishing the procedures for settlement of any disputes in the context of a third-party dispute settlement system; stating clearly that countermeasures must be adopted in good faith, applied objectively, be proportional to the seriousness of the internationally wrongful act and not affect the rights of third-party States. It was further emphasized that countermeasures should not be punitive in nature, but should be aimed at restitution and reparation or compensation. It was also stressed that armed countermeasures were prohibited under Article 2, paragraph 4, of the Charter of the United Nations, which had become a customary rule of international law. It was also suggested that consideration should be given to the issue of State responsibility in the case of reprisals out of proportion to the original breach.

75. With regard to article 58, paragraph 2, it was considered inappropriate to link the taking of countermeasures to binding arbitration, since that would give the wrongdoing State the right to initiate compulsory arbitration, which could lead to abuse by encouraging resort to countermeasures instead of limiting their use. The compulsory arbitration could also aggravate the dispute and even create new tensions between the States. It was proposed that the State taking countermeasures and the State against which they were taken should have the same possibilities of recourse to means of peaceful settlement. It was suggested that the draft could indicate that arbitration depended not only on legal considerations but also on political factors, since it affected justice and international peace and security. However, it was pointed out that if they were delinked, strict limitations would need to be imposed on the taking of countermeasures, including refusal by the wrongdoing State of an offer to settle the matter through a binding third-party procedure, as a condition for resorting to such measures.

76. Concern was also expressed that part two contained unwarranted restrictions on the use of countermeasures. It was noted that resort to dispute settlement procedures did not necessarily preclude countermeasures, since international practice did not clearly indicate whether countermeasures should be taken only after every possible concerted dispute settlement procedure had been exhausted. In the absence of such a rule, nothing could prevent a State from taking such countermeasures as it deemed appropriate. Similarly, it was felt that article 48, under which an injured State was required to negotiate prior to taking countermeasures, had no basis in customary international law, unlike the demand for cessation or reparation. Furthermore, it was not practical to prohibit the taking of countermeasures either prior to or during negotiations, since such a provision might be abused by

wrongdoing States, which would use the pretext of negotiations as a tactic to delay countermeasures. It was felt that the obligation to negotiate should be incumbent upon the State committing the wrongful act. It was also observed that the provision in article 48 concerning interim measures of protection was not sufficiently clear.

77. However, the view was also expressed that the draft articles should not deal with the complicated and largely abused concept of countermeasures, which were wrongful in themselves.

### Chapter IV
### International crimes

#### Article 52
#### Specific consequences

78. It was suggested that article 52 should state that the international crimes listed under article 19 should not be subject to a statute of limitations in accordance with the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

79. The provision enabling a State injured by a wrongful act designated as a crime to demand reparation even where that would subject the wrongdoing State to a burden out of all proportion to the benefit which the injured State would gain from compensation or that would seriously jeopardize the political independence or economic stability of the wrongdoing State was said to have no basis in international law.

80. It was also observed that article 52 should be deleted as unnecessary if the exceptions to the obligation to provide reparation in article 43 and article 45, paragraph 3, were eliminated.

#### Article 53
#### Obligations for all States

81. A number of concerns were expressed regarding this article: subparagraph (a) obliged a State not to recognize as lawful the situation created by the crime without distinguishing between explicit and implicit recognition; subparagraphs (a) and (b) contained no reference to time-frames; and subparagraph (d) required a State to cooperate with another State in any measure designed to eliminate the consequences of the crime, even if that State considered the measure to be ill-advised or unlikely to be effective.

### Part three
### Settlement of disputes

82. Third-party dispute settlement procedures were considered a sine qua non in modern international law and an indispensable protection for small and weaker States. The provisions were described as "tertiary rules" which contributed to the implementation of the secondary rules, thereby making international responsibility effective. It was suggested that reference should be made to the obligation of States to seek a peaceful solution to disputes falling under the regime of international responsibility.

83. Conversely, it was remarked that those provisions did not come under State responsibility because their objective was the peaceful settlement of disputes arising out of the application or interpretation of primary or substantive rules, as well as secondary rules or those involving attribution of responsibility. It was also remarked that dispute settlement required special, more detailed provisions the inclusion of which could be problematic for the adoption of the draft by the Commission as well as for its eventual implementation in the form of a convention. Furthermore, it was felt that the creation of a supplementary authority to rule on the validity or non-validity of arbitration decisions was unacceptable because it would inevitably affect the weight given those decisions, thereby destabilizing international relations and making the International Court of Justice the final authority for arbitration questions.

## B. Reservations to treaties

### 1. General comments

84. Many delegations supported the concept of a guide to practice, which would clarify the ambiguities and gaps of the Vienna Conventions and would be of great use to States and international organizations while no revision of the 1969, 1979 and 1986 Vienna Conventions would be undertaken. According to those delegations, rules encompassed in those Conventions were flexible and struck a balance between the objectives of preserving the text of the treaty and

universal participation and also had acquired the status of customary norms. Consequently there was no need for a separate regime for human rights treaties or the establishment of a monitoring body to determine the nature and validity of reservations, which could only be determined by States or courts.

85. Some delegations felt that the draft guidelines adopted so far proposed numerous practical solutions and clarifications in respect of definitions of reservations and interpretative declarations. Moreover, the commentaries would prove to be valuable and useful for States. The inclusion in the definition of reservations of unilateral statements by States making a notification of their succession to a treaty was also welcome. Such a notification would minimize the dangers of disputes on reservations in the future. According to one view the guidelines should ultimately culminate in the adoption of a draft convention.

86. Other delegations felt that the regime provided by the 1969 Vienna Convention did not preclude the establishment of special regimes designed to clarify the meaning and possible implications of essential clauses and expressed the wish that the Commission might consider a special regime for reservations to human rights treaties and codification agreements, for which the 1969 Vienna Convention regime relating to the effects of inadmissible reservations was unsatisfactory and ineffective and needed clarification. Thus the effect of an objection to a reservation was that the provisions to which the reservation related did not apply between the two States, which was often the opposite of what the objecting State wanted, particularly within the field of human rights. In that respect, the Commission could be inspired by contemporary international practice as, for example, that of the States members of the European Union and the Council of Europe which negotiated with the reserving States in order to persuade them to withdraw or amend their reservations, or if that failed, proposed concerted objections.

87. On the other hand, even if the State had the exclusive responsibility to rectify an inadmissible reservation, the fact remained that the incompatibility of a reservation with the object and purpose of a treaty and the ensuing consequences should be objective. Other questions were whether, in a case of a reservation contrary to article 19 of the Vienna Convention on the Law of Treaties, States had to object at all to prevent it from becoming effective; whether a State formulating an inadmissible reservation should still be deemed a party to the treaty; or even the entire issue of modifications to reservations.

88. Some delegations thought that the Commission should explore at a later stage the question and criteria of admissibility of reservations to multilateral normative treaties (such as human rights treaties) and the possible role to be played by monitoring bodies as well as the doctrine of severability. It could then revert to the question of definitions and include elements on impermissible reservations either in the draft guidelines or in the commentary.

89. According to another view, the majority of real problems generated by reservations and their consequences did not involve the question of their definition. In that context it was also observed that since not all guidelines dealt with definitions (e.g., guidelines 1.3.1 and 1.3.2) the title of the first chapter, as well as that of some of the guidelines (e.g., 1.6), should be modified accordingly.

90. It was suggested that the Guide to Practice should also include model statements, an approach followed by the Committee of Legal Advisers on Public International Law of the Council of Europe in the case of reservations.

91. It was also suggested that the Guide should address the issue of internally inconsistent declarations, which at times seemed to be a reservation and at others an interpretative declaration.

## 2. Comments on the draft guidelines

### Draft guideline 1.1.1 (Object of reservations)

92. Several delegations supported the reformulation of draft guideline 1.1.1 since it reflected better the practice of across-the-board reservations that excluded the application of a treaty as a whole to certain categories of persons, objects, situations or circumstances. However, despite the fact that the issue of the definition of reservations differed from that of their admissibility and legal effects, those delegations expressed the concern that an explicit definition of across-the-board reservations could contribute to intensifying an already widespread practice of making such reservations. Those reservations should be distinguished from general ones which "nullified" any commitment and should be rejected together with

reservations relating to *jus cogens* norms or obligations *erga omnes*.

**Draft guideline 1.1.2 (Instances in which a reservation may be formulated)**

93. It was suggested that a cross-reference to article 20 of the 1978 Vienna Convention should be added to the text since a notification of succession was a means of expressing consent to be bound by a treaty.

**Draft guideline 1.1.3 (Reservations having territorial scope)**

94. Some delegations were of the view that no decision as to whether or not such a statement was a reservation could be made without first analysing the object of the treaty and the effect that the statement would have on its application. The legal situation with respect to the various parts of a territory varied considerably between States, as did the competence of the central Government to legislate for autonomous regions. If all such statements were invariably qualified as reservations, some States would be prevented from ratifying treaties which explicitly forbade reservations. It was suggested that the temporal limitation referred to in guidelines 1.1.5 and 1.1.6 should also be included in guideline 1.1.3 (and in guideline 1.1.4).

**Draft guidelines 1.1.5 (Statements purporting to limit the obligations of their author) and 1.1.6 (Statements purporting to discharge an obligation by equivalent means)**

95. It was proposed that these guidelines could become new paragraphs in the guideline on object of reservations (1.1.1). A simple reference could then be made in the related commentary to statements purporting to undertake unilateral commitments (guideline 1.4.1). According to another view, guideline 1.1.6, which required equivalence in the manner in which an obligation was discharged, did not correspond to widespread practice and would be redundant if the object of the provision of a treaty was a specific result and not the way in which it was achieved. Moreover, the notion of equivalence was rather indeterminate and could complicate the implementation of the guideline. The words "but equivalent to" should therefore be deleted.

**Draft guidelines 1.1.7 (Reservations formulated jointly) and 1.2.2 (Interpretative declarations formulated jointly)**

96. A view was expressed that it would be useful to insert in the text provisions regarding the various different cases of withdrawal of reservations or interpretative declarations formulated jointly.

**Draft guideline 1.2 (Definition of interpretative declarations)**

97. Delegations felt that the definition of interpretative declarations, often confused with reservations, was very important in that it established their different purposes pertaining generally to the interpretation of treaties.

98. Delegations endorsed the decision to treat the definition of interpretative declarations separately in the guidelines since the difference between them and reservations very often seemed very subtle. A number of elements had helped to blur the necessary distinction between reservations and interpretative declarations. The criterion of intent, which had been chosen to define interpretative declarations, was satisfactory. However, the definition of an interpretative declaration should also specify the moment at which such declaration could be formulated since it would be preferable to confine such declaration to a limited period of time. The time element was just as necessary in the case of conditional interpretative declarations.

99. It was noted that there was not a single or unequivocal concept of interpretative declarations, but different ones as to their legal effects depending on whether they referred to multilateral or bilateral treaties.

100. According to another view, there was no need to subdivide interpretative declarations into too many subcategories, and it was also suggested that a less "subjective" wording pertaining to the interpretation given to the treaty might be more appropriate.

101. It was also noted that interpretative declarations were an important and flexible instrument (since they were not strictly limited to the moment at which the successor State expressed its consent to be bound by the treaty) for the interpretation and any adjustment of treaty obligations of successor States, which were often obliged to give notice of succession to an entire body of treaties within a limited period of time.

102. A view was expressed to the effect that interpretative declarations were often the only way for States to accede to a general multilateral instrument and therefore they should be considered in the light of the specificities of different cultures which influenced the legal regimes of nations.

**Draft guideline 1.2.1 (Conditional interpretative declarations)**

103. It was suggested that the Commission should further clarify the distinction between simple and conditional interpretative declarations and the consequences thereof, especially in relation to bilateral treaties. This might also necessitate a revision of guideline 1.5.2 or its commentary.

104. It was also observed that conditional interpretative declarations should be classified as part of the regime applicable to reservations, whereas according to another view, the distinction between reservations and conditional interpretative declarations should be maintained owing to the special nature of the latter, which did not apply automatically and took effect only if and when the condition in question was fulfilled. Moreover, further consideration should be given to possible consequences of such declarations (for example: who decided that the condition had been met and when, etc.).

**Draft guideline 1.3 (Distinction between reservations and interpretative declarations)**

105. Some delegations found this guideline very useful since it stressed the importance of the legal effect that a unilateral statement sought to produce. The content of any statement was but one element to be taken into consideration in ascertaining the true nature of the statement. According to one view, this guideline should be merged with draft guideline 1.3.2.

**Draft guideline 1.3.1 (Method of implementation of the distinction between reservations and interpretative declarations)**

106. It was noted that this guideline provided a general rule which was very useful, including the supplementary means of interpretation of a given unilateral statement such as any other document (in addition to the treaty or the relevant unilateral statement) in cases where the interpretation left the meaning ambiguous or led to a manifestly unreasonable result.

107. According to another view, the intention of the State formulating the statement was always reflected in the text of the statement.

**Draft guideline 1.3.3 (Formulation of a unilateral statement when a reservation is prohibited)**

108. It was suggested that when a treaty explicitly prohibited any reservations, no reservation of substance was permissible and that element should be reflected in the text of the guideline in order to prevent any abuse. In that sense guideline 1.3.3 appeared to be weakened by the phrase "except when it purports to exclude or modify the legal effect of certain provisions of the treaty" since such formula did not state directly that declarations made with such intent should be considered improper by States.

**Draft guideline 1.4.1 (Statements purporting to undertake unilateral commitments)**

109. Delegations agreed that unilateral declarations purporting to increase the obligations of States beyond those imposed on them by a treaty did not constitute reservations and consequently did not pertain to the scope of the Guide to practice. Rather, such commitments resembled unilateral acts.

**Draft guideline 1.4.2 (Unilateral statements purporting to add further elements to a treaty)**

110. It was observed that this guideline should also subsume guideline 1.1.6 on statements purportary to discharge an obligation by equivalent means as well as guideline 1.3.3 on formulation of a unilateral statement when a reservation is prohibited, because in both cases further elements were added to the treaty.

**Draft guidelines 1.4.3 (Statements of non-recognition), 1.4.4 (General statements of policy) and 1.4.5 (Statements concerning modalities of implementation of a treaty at the internal level)**

111. Some delegations agreed with the view that statements of non-recognition and general statements of policy should be excluded from the scope of the Guide to Practice. They were also of the view that statements of non-recognition sought to deny the non-

recognized entity the capacity to make a commitment rather than to exclude or modify the legal effect of particular provisions of the treaty. Accordingly, these guidelines should be removed altogether from the Guide. This view was opposed by another, according to which the guidelines should be included, since they contributed to a better understanding of the subject. It was suggested that the Commission should address the legal effects of statements of non-recognition that excluded the application of a treaty between the declaring State and the non-recognized entity, since they could be similar to those of reservations.

112. It was also observed that the commentary to guideline 1.4.4 could be further clarified.

113. As regards statements concerning modalities of implementation of a treaty at the internal level (1.4.5), it was observed that in cases where the treaty made specific modalities of implementation compulsory for the internal legal systems of States parties, such statements could constitute veritable reservations even if the desire to modify or exclude the legal effect of certain provisions of the treaty was not immediately apparent. Therefore a phrase should be added that such statements not only did not purport to have any effect on the rights and obligations of the author State but also, at the same time, they were incapable of having such effect.

**Draft guidelines 1.5.1 ("Reservations" to bilateral treaties), 1.5.2 (Interpretative declarations in respect of bilateral treaties) and 1.5.3 (Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party)**

114. Delegations supported the view that unilateral statements in respect of bilateral treaties did not constitute reservations but proposals to renegotiate the treaty. The title of draft guideline 1.5.1 should be modified accordingly to indicate that it dealt with statements aimed at modifying a bilateral treaty and the text itself should clearly reflect this fact. It was also observed that the guidelines on reservations to bilateral treaties should be removed from the Guide to Practice. However, it was noted that there was a practice of States making interpretative declarations in respect of bilateral treaties.

## C. Unilateral acts of States

### 1. General comments

115. Several delegations stressed the relevance as well as the complexity of the topic under the Commission's consideration. It was noted in this connection that this complexity arose, both in the doctrine and the practice of international law, not only because of the extraordinary variety of unilateral acts, but also because they were omnipresent in international relations, constituted the most direct means that States had of expressing their will and were a means of conducting day-to-day diplomacy. There was no question that, whether or not unilateral acts were a source of international law in the sense of Article 38 of the Statute of the International Court of Justice, State practice and precedents confirmed that they could create legal effects, engendering rights and obligations for States.

116. The above notwithstanding, the task before the Commission was a challenging one for two reasons. On the one hand, considerable uncertainty reigned as to the legal regime on such acts, and it was difficult to establish precise rules that did not constitute a source of disputes. On the other hand, it was not always easy to distinguish between legal acts and political acts at the international level and to decide which ones should be the focus of the Commission's attention. Hence the importance of the topic, since codifying or developing relevant rules or guidelines in the field would enhance predictability in international relations.

117. Satisfaction was expressed at the fact that, notwithstanding the complexity of the issues involved, progress has been achieved on the topic. The second report of the Special Rapporteur, it was noted, contained very significant and relevant elements and clearly identified the main issues to be addressed.

### 2. Definition and scope of the topic

118. A number of delegations supported the concept of unilateral act contained in paragraph 589 of the Commission's report, which it proposed as a basic focus for its study on the topic and as a starting point for the gathering of State practice thereon. They considered it a good starting point for the topic's consideration.

119. The importance of the element "intends to produce legal effects" contained in the above-mentioned concept was underscored. Referring to the difficulty often involved in distinguishing between a "legal" and a "political" act, several delegations stressed that it was precisely the element of "intent to produce legal effects" on the part of the State issuing the act which made it possible to distinguish between those acts that should fall under the scope of the topic and those that should not. Some delegations went as far as suggesting that all unilateral acts were really "political" in nature. Consequently, the only real criterion for determining whether an act should fall under the scope of the topic was whether its author had intended to produce legal effects.

120. Some delegations, while not denying the importance of the element of "intent", pointed to the difficulties inherent in that notion. Thus, in one view, the element of intent could be hard to prove and was thus susceptible to interpretation. In another view, in addition to the above-mentioned difficulty, there could also be a gap between intention and result; in other words, acts performed with the intention of producing legal effects did not necessarily achieve the intended results and, vice versa, acts that did not intend to produce legal effects sometimes produced them. In that connection the suggestion was made that the word "intention" could be further clarified in the commentary to the draft articles.

121. As regards the element of "intention to produce legal effects", it was further observed that the role of the addressee of the act was also important. The addressee might sometimes reject the legal effects for political reasons, for example, in order to oblige the author State to enter into negotiations, whereas the author State sometimes wished to avoid entering into negotiations. Consideration should therefore be given to whether the addressee could reject legal effects intended to be in its favour.

122. It was also noted that some unilateral acts of States aimed at establishing obligations for the author; others, at establishing rights; and still others, at establishing both obligations and rights: that question merited serious study. Different unilateral acts might produce different consequences: the legal effects of some unilateral acts might be based on the necessity to honour a commitment, or the principle of good faith, whereas unilateral acts aimed at establishing rights for the author State might have another basis.

123. A view was expressed in this connection that in its study of unilateral acts, the Commission could proceed on a step-by-step basis, starting with statements that created obligations rather than those that were aimed at acquiring or maintaining rights. The scope of the study could be expanded later to include the latter category of statements, taking into account the results of the work on the former.

124. The observation was also made that in some cases it seemed that a study of unilateral acts impinged on other, more substantive regimes of international law. For instance, recognition of States might take place by unilateral action, but the conditions and legal ramifications of recognition constituted a celebrated issue of international law which could not be addressed solely with reference to its mode of action. A question was also raised as to whether such a case should be included in a study of unilateral acts or would be better considered on its own terms as a distinct regime.

125. From a drafting point of view, a suggestion was made that in the definition contained in paragraph 589 the verb "intends" should be replaced by the verb "purports", to bring the wording in line with the definition of reservations, which themselves were unilateral acts. In view of this, it was suggested that it would be prudent to ensure coherence between the draft on unilateral acts and that on reservations to treaties.

126. Different views were expressed on whether the notion of "autonomy" of the unilateral acts should be part of the concept elaborated by the Commission in paragraph 589 of its report. Some delegations supported the view expressed by the Special Rapporteur in his first report on the topic, namely that only those unilateral acts which were doubly autonomous, i.e., those that did not emanate from other legal acts and that the State was free to carry out, should come under the topic's purview. Consequently, those delegations would have liked the notion of "autonomy" to have been retained in the concept of unilateral acts elaborated by the Commission in paragraph 589.

127. Other delegations supported the non-inclusion of the notion of "autonomy" in the concept of unilateral acts elaborated by the Commission. It was noted in this connection that the "autonomy" of unilateral acts was totally conditional since the legal obligation that they created arose not from the unilateral expression of the

will of the State that issued them, but rather from the compatibility between that will and the interests of other States. It was unimaginable that a unilateral act would have legal effects in the relations between its author and another subject of international law if the latter had raised objections. Furthermore, a State that made a unilateral declaration took into consideration the reactions of those to whom it was addressed.

128. Some delegations stressed the ambiguity of the word "autonomy". On the one hand, a unilateral act, to be defined as such, had to have autonomous legal effects, which meant legal effects independent of any manifestation of will on the part of another subject of international law. The autonomy of obligation created by a unilateral act was an important criterion in determining the purely unilateral nature of the act. On the other hand, if an autonomous unilateral act was an act that created legal effects on the international level without any link with a pre-existing customary or treaty norm, the topic would lose a great part of its interest. It was appropriate to exclude unilateral acts based on treaty law, but unilateral acts that could contribute to the implementation of existing norms should come within the topic's purview.

129. In one view, the Commission's exclusion, in paragraph 589 of its report, of unilateral acts subject to special treaty regimes was somewhat questionable, since such acts usually involved practical situations that were in particular need of analysis. However, the exclusion of declarations accepting the jurisdiction of the International Court of Justice was understandable since it was for the Court itself to decide on its own competence.

130. In another view, it was impossible to codify all unilateral acts within a single legal regime, because of their great diversity. Consequently, a prudent approach should be taken, excluding unilateral acts of States that were related to treaty law and acts that were already regulated by international legal norms.

131. Support was also expressed for the phrase "is notified or otherwise made known to the State or organization concerned", which was contained in the definition in paragraph 589 of the Commission's report. It was noted in this connection that a unilateral act did not necessarily have to be formulated publicly, although the addressee would need to be aware of it.

132. Referring to the scope of the topic, some delegations supported the Commission's course of action to exclude from the topic's purview for the time being acts of international organizations. It was suggested, however, that they could be the subject of a special review by the Commission at a later stage.

133. As regards acts engaging the international responsibility of the State, one view supported their exclusion from the topic's purview, particularly as they were already the subject of another Commission's topic. In another view, however, caution was necessary. The conditions for engaging State responsibility by a unilateral act could appropriately be excluded as the Commission was working on State responsibility as a separate topic. If, however, unilateral acts of States which gave rise to obligations for States were excluded from the topic's scope, there was a risk of excluding all unilateral acts, as they were almost all, in certain circumstances, likely to involve State obligations.

134. In one view, it was regrettable that the Commission's projected study on the topic did not seem to include unilateral acts of States in the form of the unilateral enactment of domestic laws having extraterritorial effects on other States and in turn affecting other forms of international relationships, including commercial and financial ones, whether with third States or their nationals. In this view, the scope of the definition of unilateral acts should be expanded to include both acts of enactment of domestic legislation which had direct and/or indirect extraterritorial application to other States or nationals of other States and recourse to the unilateral use of force by a State on nationals of other States within the territory of other States in furtherance of the enforcement of domestic legislation. This view would welcome a study of State responsibility in the light of the research to be done on aspects of the proposed expanded scope and in the light of the provisions of Article 2, paragraph 4, of the Charter of the United Nations. A study of the two topics, together with recommendations, would serve at least as a useful guide to States in their dealings with each other. It should also mean that the rule of international law in that sphere would not be ignored or given scant respect.

135. As regards estoppel, one view was not entirely convinced that it should be excluded from the Commission's study. This view stressed that estoppel usually resulted from a unilateral act, the State performing the act losing, because of estoppel, the right to use a certain fact or situation as a basis for asserting its rights. In this view, estoppel was not merely a

procedural instrument, but related directly to the topic under discussion.

136. According to the same view all forms of unilateral expressions of will should be considered by the Commission, including silence.

## 3. Approach to the topic

137. Two main questions were discussed as aspects of the approach to the topic. The first question was related to whether the Commission should focus its attention on the "declaration" as a prototype, instrument or formal procedure whereby a State could produce legal consequences in a unilateral manner on the international plane, or, rather, on the negotium or substantive contents of unilateral acts.

138. Some delegations seemed to favour a "formal" approach, whereby the Commission should focus for the time being, on declarations as formal lawmaking acts. The objective of the codification, it was said, should be to bring the different kinds of unilateral acts together in a system of rules that would apply to all of them. The rules applicable to a unilateral act, it was also said, should be homogeneous and applicable to all unilateral acts regardless of their content. However, even those delegations recognized that, in undertaking such an exercise, the contents of the act could not be entirely disregarded, since otherwise, the whole exercise might become unduly restrictive.

139. Other delegations clearly indicated that the Commission should not limit its analysis to a single category of unilateral acts, such as declarations, but should try to cover all categories. In this view, there were four types of unilateral acts: a promise, a waiver, a recognition and a protest, each of which had its own characteristics which the Commission would have to identify and analyse.

140. The other question concerning the approach to the topic which was discussed was related to the role that the 1969 Vienna Convention on the Law of Treaties should play in developing provisions on unilateral acts.

141. Some delegations had reservations about the course of action adopted by the Special Rapporteur in his report, which took the 1969 Vienna Convention as a point of reference for developing draft articles, *mutatis mutandis* on unilateral acts. In their view, this approach was somewhat risky and did not take sufficiently into account the fact that unilateral acts, by their nature and effects, differed from treaty acts and, consequently, the Convention did not provide an appropriate framework for analysing the legal effects of unilateral acts.

142. Other delegations did not share those reservations. They felt that since many aspects of unilateral acts were related in various degrees to treaty law, relevant articles of the Vienna Convention on the Law of Treaties could be used for reference when provisions were being formulated. The view was expressed in this connection that there were many points of intersection between treaty acts and unilateral acts. Both were legal acts and belonged to the same regime in terms of expression of will, invalidity, conditions of existence, etc. Consequently, many provisions of the Vienna Convention could be transposed to unilateral acts, but the Commission should not do that automatically. In this connection the view was also expressed that while the question of applicability of treaty law to unilateral acts was highly relevant, the differences between the two regimes should not be overlooked. The law of treaties was governed by the principle of *pacta sunt servanda*, which was not to be found at the core of unilateral acts.

143. Some delegations provided examples of areas where provisions on the law of treaties and on unilateral acts could coincide as well as examples of other areas where they would diverge. Thus, as regards examples of possible coincidence, the view was expressed that the rule set out in draft article 4, paragraph 3, proposed by the Special Rapporteur, which dealt with representatives of a State for the purpose of formulating unilateral acts, was too broad, since under the law of treaties the capacity of heads of diplomatic missions was limited to acts producing legal effect exclusively vis-à-vis the State to which they were accredited.

144. Likewise, draft article 7 on invalidity of unilateral acts should follow more closely the corresponding provision in the Vienna Convention. Since the consent to be bound by a treaty and the consent to a unilateral commitment were both expressions of the will of a State, it seemed logical that the same reasons for invalidity should apply to both types of statements. There was thus no reason to omit the specific restrictions on the authority to express the consent of a State. Furthermore, paragraph 7 of draft article 7 should be modelled on article 46 of the Vienna Convention of 1969. The rule should apply not to all

clear violations of a fundamental rule of internal law, but only to manifest violations of a rule of internal law of fundamental importance governing the competence to conclude treaties.

145. As regards possible areas where provisions on treaty law and on unilateral acts might differ, the example was given of article 6 proposed by the Special Rapporteur, entitled "Expression of consent", an expression taken from the Vienna Convention on the Law of Treaties, which did not convey very clearly what was intentional about the unilateral act. It was also pointed out that there was one area where the rules of the law of treaties and the rules applicable to unilateral acts were of necessity divergent; that was the area of the interpretation of unilateral acts (see also section 4 below).

## 4. The questionnaire on State practice

146. A number of delegations stressed the need to pay close attention to State practice in the consideration of the topic. The view was expressed in this connection that, given the relative scarcity of available international practice or doctrine, a more extensive accumulation of State practice was required if the Commission was to tackle the topic effectively.

147. In this respect wide support was expressed for the questionnaire which, as requested by the Commission, the Secretariat, in consultation with the Special Rapporteur, had distributed to Governments. It was also hoped that the questionnaire would meet with the widest possible response.

148. Some delegations had already addressed specific points contained in the questionnaire.

149. As regards the question of who has the capacity to act on behalf of the State to commit the State internationally by means of a unilateral act, it was noted that paragraph 3 of article 4 as proposed by the Special Rapporteur might not reflect State practice. Only heads of State or Government, Ministers for Foreign Affairs or expressly empowered officials could commit the State by means of unilateral acts. This international rule was now fully recognized and its importance was fundamental. Since the contemporary world was characterized by the multiplication of communications and relations between institutions and by acts carried out outside the country by agents of the State, it was important to know precisely who could commit the State by a statement or a unilateral act. Moreover, the conclusion of a treaty, an instrument which involved rights and obligations, required the presentation of credentials signed by the Minister for Foreign Affairs unless it was concluded by one of the three aforementioned persons. It was easy to understand that an official, even one at the highest level, could not create international obligations for his State by carrying out a unilateral act. Anything one might want to add to that established rule of customary law would have to be considered from a restrictive angle. The only course was to seek to improve the formulation presented by the Special Rapporteur by taking contemporary international realities into account.

150. With respect to the formalities to which unilateral acts were subjected, it was observed that neither the practice of States nor case law or doctrine required particular forms. The rule was that the expression of the will of the State should be known by the other States or other subjects of international law concerned. The only requirements were the clarity and deliberate nature of the expression of will, bearing in mind the terms used in the text of the declarations, their intention and the factual and legal context in which they were made.

151. In connection with the legal effects which the acts purported to achieve, reference was made to the opinion reflected in paragraph 560 of the Commission's report, namely that unilateral acts formulated in violation of a Security Council resolution adopted under Chapter VII of the Charter of the United Nations should be invalid, for example, an act of recognition adopted in violation of a Security Council resolution calling upon Members not to recognize a particular entity as a State. In that respect, one view held in the Sixth Committee maintained that an act infringing general international law would not produce legal effects if it was not accepted by the addressee States. Thus the issue was one of legal effect rather than invalidity. The same held true for a unilateral act in violation of a Security Council resolution adopted under Chapter VII of the Charter. Since most resolutions had temporary effects, the issue could also be approached from the point of view of the suspension of the legal effects of a unilateral act.

152. As regards the possible contents of unilateral acts, the view was expressed that such acts should be intended to produce legal effects, to modify the legal

situation of the State carrying out the act and, indirectly, that of the State or States affected by the act. In general, that effect consisted in creating or modifying an obligation or waiving a right under international law. But there were also unilateral acts the purpose of which was to define or clarify legal concepts, as was shown by the history and evolution of certain principles of the law of the sea.

153. As to the rules of interpretation which should apply to unilateral acts, the point was made that the Special Rapporteur and the Commission should take into consideration characteristics inherent in acts whose elaboration and intention differed from that of conventional acts, which depended on agreement and not on a State's expression of its willingness to produce legal effects. It was noted that, as the International Court of Justice had stated in the *Nuclear Tests* cases, the declaration by which a State limited its freedom of action must be interpreted strictly. That was simply a corollary of the celebrated dictum of the Permanent Court of International Justice in the *Lotus* case. As with any unilateral legal act, the intention of the author played a fundamental role. It was for precisely that reason that the determining factor constituted by the circumstances of the act, in other words, the context in which the act was carried out, must not be overlooked. Moreover, in the *Anglo-Iranian Oil Co.* case, the Court had laid down the rule that the act must be interpreted in such a way that it produced effects that were in conformity with existing law and not in contradiction to it.

154. As regards the duration of unilateral acts, a view was expressed to the effect that such acts were instantaneous because they did not go beyond the immediate expression of the will to assume an obligation.

155. Views were also expressed on whether or not unilateral acts could be revocable. It was noted in this connection that the modification, suspension or revocation of unilateral acts must not depend solely on the will of the author State. The granting of consent by the addressee State was considered indispensable. It was important to distinguish between the unilateralism that characterized the elaboration of the act and its legal effects, which could give rights to States that had not participated in its elaboration. Once the unilateral act was elaborated and the State had expressed its willingness to engage in a relationship with another State, the relationship created was not unilateral. It was stressed that unilateral acts could not be unilaterally revoked or restrictively modified. Once the declaration had produced legal effects and created rights or given powers vis-à-vis other States, it could not be revoked or limited except with the consent of the States concerned.

156. In one view, although it was true that once the author of a unilateral act had expressed its will, it could not at its own discretion either revise or revoke a promise, a waiver or the act in question, the author could however subordinate the will thus expressed to the expiry of a time limit or to the fulfilment of a condition, or state explicitly that it might one day counterdemand it. This view recalled that some writers maintained that while the possibility of revocation did not fall within the context of the act in question or its nature, a promise or a waiver were in principle irrevocable. Other writers believed, on the contrary, that such acts were revocable but not in an arbitrary manner or in bad faith. According to the view summarized in the present paragraph, it was clear that the legal situation created by a unilateral act could not be immutable: it was subject to general rules such as the principle *rebus sic stantibus*, the exception of *force majeure*, etc. It might even be said that certain unbilateral acts, such as protest, were in general revocable.

### 5. Outcome of the work on the topic

157. Support was expressed for the Commission's course of action on the topic, which consisted in the preparation of draft articles by the Special Rapporteur, accompanied by commentaries.

## D. International liability for injurious consequences arising out of acts not prohibited by international law (Prevention of transboundary damage from hazardous activities)

### 1. General comments

#### (a) Comments on prevention

158. The view was expressed that the Commission had made a useful contribution on the topic since beginning its work, which included a comprehensive and

thorough review of the issue of prevention and the obligation of due diligence, and that the draft articles managed to balance the interests of States of origin with those of States likely to be affected.

159. The view was expressed that the draft articles should maximize the freedom of States to conduct, within their territories or under their jurisdiction or control, activities which were not in themselves unlawful. Accordingly, the draft articles should specify the conditions under which such activities were permitted, irrespective of whether they entailed a risk of causing significant transboundary harm or if such harm occurred. Nonetheless, it was also noted that preventive measures should be envisaged even in those situations where risk had not been established scientifically. Furthermore, it was deemed that the draft articles should require States to assess the risk of their existing activities on an ongoing basis.

160. The point was also made that conditions which would allow States the maximum freedom of action should provide for compensation for any harm which might occur despite the preventive measures, or in their absence if the harm had not been foreseeable.

161. It was argued that the duty of prevention should be regarded as an obligation of conduct and that failure to comply with the obligation of prevention would therefore entail State responsibility. The point was also made that a more solid and objective legal basis was required for measuring compliance and identifying the degree of violation.

162. It was noted that the definition of those activities to which the draft articles would apply, as well as the scope of the instrument, required further clarification.

163. It was also felt that the draft articles on prevention should not be related to the idea of punitive damage currently being discussed by the Commission in the context of State responsibility.

164. As regards the obligation of due diligence, a view was expressed that it was regrettable that the Commission had been unable to consider the proposals contained in the second report of the Special Rapporteur (A/CN.4/501). It was noted that due diligence could not be the same for all States since standards acceptable for developed countries might be unattainable for other States. It was also pointed out that issues relating to the fulfilment of the obligation of due diligence should be dealt with separately from the draft text on prevention.

**(b) Comments on liability**

165. With respect to liability two different views were expressed. According to one view, which was supported by several delegations, the Commission's decision to suspend its work on the topic until concluding its second reading of the draft articles on the regime of prevention was the appropriate course of action.

166. In that context it was suggested that a pause in the Commission's work on the topic might be appropriate in order for international practice to develop in the area of liability. In that connection it was felt that international regulation in the area of liability should proceed through careful negotiations on particular topics, such as oil pollution or hazardous waste, or in particular regions, and not by attempting to develop a global regime.

167. However, according to another view, supported by several other delegations, the Commission should pursue its analysis of liability without awaiting the completion of the second reading of the draft articles. In that connection it was noted that prevention and liability formed a continuum beginning with the duty to assess the risks of significant transboundary harm. It was deemed contradictory to pose the general obligation to prevent transboundary damage while not providing for the consequences arising from any actual damage, a matter dealt with by most national legislations. It was emphasized that the liability incurred required the reparation of the harm suffered, irrespective of whether the causative act was wrongful or not.

168. The point was made that every State had the right to engage in lawful activities within its territory so long as it complied with the obligation to ensure that its enjoyment of that right did not harm another State, failing which liability should be attached to it. In the event of harm, the aggrieved State should be entitled to compensation. The nature and extent of liability for such harm needed to be clearly defined.

169. The point was made that State practice with regard to hazardous activities showed that the concept of liability for transboundary damage was becoming increasingly established and therefore it was important to elaborate rules on international liability per se.

170. Furthermore, concern was expressed about the possible termination of the work on the topic of liability since that would hamper the full development and effectiveness of rules relating to prevention. In this connection it was noted that there was an inherent relationship between the duty of States to exercise due diligence while discharging their obligations relating to prevention and the question of liability if such obligations were not fulfilled.

171. It was noted that the consequences of international liability required analysis, even in situations where the State of origin of the damage had taken every precautionary measure. Since in such cases the obligation to make a reparation was of a special nature, the rules concerning it should comply with certain special principles and supplement the principles relating to responsibility for an unlawful act.

172. The view was expressed that the methods by which the State of origin provided compensation, and the factors to be considered in determining its need and extent, should reflect State practice; furthermore, the draft articles should not impose application of a rule of strict liability to compensate losses resulting from transboundary harm, but should provide for an equitable sharing of costs of activities, as well as of their benefits. It was recalled that principle 22 of the Stockholm Declaration and principle 13 of the Rio Declaration had already called for cooperation to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of States to areas beyond their jurisdiction.

173. A view was expressed that State liability could be seen as no more than residual compared with the liability of the operator of the activity resulting in transboundary harm; in that connection it was noted that States had admitted to liability only under specific treaties that related to activities exclusive to States, which was not necessarily the case for all the activities envisaged by the draft articles.

174. The suggestion was also made that it might be worthwhile to draft rules dealing with the prevention of damage to spaces not subject to any jurisdiction, such as the high seas.

## 2. Comments on specific articles

### Article 1. Activities to which the present draft articles apply

175. The suggestion was made to include an illustrative list of activities that involved a risk of transboundary harm.

176. The point was made that should States only be called upon to take measures to prevent or minimize the risk of causing "significant" harm; the concept of significant harm would then require careful elaboration.

177. The view was expressed that the word "significant" should be deleted before "transboundary harm", since no provision had been made for a dispute settlement mechanism.

178. Some delegations regretted the deletion of article 1 (b) since it was also important to contain and minimize the adverse effects arising from the normal conduct of hazardous activities and from accidents.

### Article 17. Settlement of disputes

179. As regards dispute settlement, support was expressed for draft article 17 as a reasonable solution. It was also noted that, pending a determination on the final form to be given to the draft articles, "soft" procedures such as consultation, negotiation, investigation and conciliation could be envisaged.

## 3. Final form of the draft articles

180. The point was made that it was too early to determine the final form to be given to the draft articles. In this connection it was felt that a framework convention might foster desirable State practice and relevant legal development. It was also stated that, in the absence of a convention which was general in scope, a series of guidelines combined in a declaration for guidance of States in concluding bilateral or regional treaties was acceptable.

## E. Other decisions and conclusions by the Commission

### 1. General comments

181. Only a few delegations discussed chapter X of the report of the Commission, entitled "Other decisions and conclusions of the Commission".

182. A change was noted in the working method of the Sixth Committee which in turn affected its considerations of the annual reports of the Commission. It was recalled that in the 1970s, delegations participated in discussions of subjects on the agenda of the Sixth Committee point by point and issue by issue. That practice had been changed in the recent past, owing to the growing number of Member States and the emergence of groups of States presenting a single position. On the positive side, that practice had favoured mediation, but on the negative side, it had led to the adoption of longer, muddier and less legally precise resolutions, which supposedly rested on a notion of "general agreement". In the past, the voting on draft resolutions had at times represented a test of strength and sponsors had been disinclined to negotiate, but negotiations had been based on real issues and preceded by real debate. Currently, although consensus was the norm, it was also unfortunately purely formal and involved texts that lacked legal meaning and weight. It was noted that that phenomenon affected not only the Sixth Committee but also the other Main Committees of the General Assembly, and even other United Nations bodies such as the Security Council, whose decisions were directly binding in law.

183. To remedy that situation, it was stated that the burden of work during and between sessions of the International Law Commission should first and foremost be divided among a greater number of delegations, for the sake not only of fairness but also of independence and with a view to genuinely representing the different existing points of view. Governments were also recommended to continue to appoint to the Sixth Committee young lawyers who could gain invaluable experience in international law but who would also lend the Committee their dynamism and legal skills.

184. It was also noted that the format of the annual reports of the Commission had been changed compared to that of the 1970s and the recent reports showed many improvements in form and substance and were easier to read. It was further stated that the modernization of the Commission's working methods, largely attributable to the efforts of new delegations that had joined since 1970, did not obviate the need to continue to survey the field for new topics to fuel its future debates. Governments had a part to play in that process.

185. Turning to the difficult question of the role of the Sixth Committee and of member delegations in analysing the report of the Commission, it was stated that dialogue was an essential part of that analysis and consisted of an exchange between two speakers. For reasons related to the nature of the annual debate and the quality of governmental responses to Commission reports and questionnaires, that exchange was not as fruitful as it should be. The introduction of mini-debates on individual chapters of the report instead of a blockbuster debate on the whole report had brought about a reduction in the length of statements and introduced some variety into the topics dealt with during the session. The question should nevertheless be asked whether that reform had improved the quality of the debate, since the consideration of a topic lasted only two or three meetings, obliging delegations to deliver statements either prepared in advance or hastily written at the last moment.

186. It was further noted that it was important to maintain the independent function of Commission members from Government representatives to ensure objectivity. In that context reference was made to the attendance of Commission members as Government representatives in the Sixth Committee during the consideration of the annual reports of the Commission. It was felt that the problem arose from the fact that neither the members of the Sixth Committee nor the members of the Commission had a clear idea of what the Sixth Committee's annual debate on the Commission's report should be. Is it simply an occasion for delegations to express their respect for the work done by the Commission or is it rather an opportunity for them to express their views and concerns with a view to guiding its future work? Is it the occasion for the Commission to hear the immediate reaction of States to its report or subsequently to receive detailed comments and observations? This last approach could perhaps be replaced by a series of informal meetings throughout the year. The question was what form the debate should take and whether its

form should remain unchanged year after year. According to one view, the debate did not need to take the same form every year. Commission members might be invited to the General Assembly to attend the meeting of legal advisers for an informal exchange; or informal meetings might be organized on the Commission's topics for the special rapporteurs dealing with those subjects, other Commission members and delegations. The hope was expressed that the above proposals would be given careful consideration, particularly during the fifty-second session of the Commission.

### 2. Split sessions

187. With regard to the question of split session, according to one view, the proposal to split the Commission's sessions into two shorter sessions would reap gains beyond the Commission's expectations. However, according to another view, the Commission would benefit from dialogue and interaction with the Sixth Committee in New York. According to this view, though it would be premature to decide to hold split sessions permanently in view of their financial implications and the practical disadvantages of travelling back and forth between New York and Geneva. Greater productivity should form the basis for any decisions on the issue.

### 3. Long-term programme of work

188. With regard to the long-term programme of work, a view was expressed that the topics to be studied by the Commission should meet the desires and needs of Member States. In that context, according to the same view, the Commission could usefully undertake a separate study on the regime of countermeasures, instead of dealing with that topic in its draft articles on State responsibility. It would be useful for the Commission to consider the decisions adopted by international organizations, particularly their legal effects, especially as it did not wish to deal with unilateral acts of international organizations before completing its work on unilateral acts of States. Under the same view, reservations were expressed about some of the topics being considered by the working group on the long-term programme of work such as the right to collective security, and the risk of fragmentation of international law. Again according to this view, the topics of the responsibility of international organizations and the effect of armed conflict on treaties were appropriate for codification. The question of environment was considered not useful to be addressed, except to define a specific aspect that was problematic. Similarly, a topic such as the legal aspects of corruption and related practices was considered inappropriate, according to this view.

## F. Nationality in relation to the succession of States [see A/CN.4/504/Add.1]

## G. Jurisdictional immunities of States and their property [see A/CN.4/504/Add.1]